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No. 98-8384
A-746

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

TERRY WILLIAMS,

Petitioner

v.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit and Application
for a Stay of Execution

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant a stay of execution and certiorari to review the Fourth Circuit's routine, fact-bound application of Strickland v. Washington and its conclusion that Williams failed to demonstrate that he was prejudiced by counsel's failure to present certain mitigating evidence at his 1986 capital sentencing proceeding?

2. Does the Fourth Circuit's de novo review of petitioner's ineffective counsel claim render moot his argument about the Court of Appeals' interpretation of 28 U.S.C. § 2254(d)?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On September 30, 1986, Terry Williams was convicted of the capital murder of Harris Thomas Stone in a jury trial in the Circuit Court of the City of Danville, Virginia. In a separate penalty proceeding, the jury fixed Williams' sentence at death based on its finding of future dangerousness, see Va. Code § 19.2-264.4(C), and the trial court sentenced Williams to death on November 19, 1986.

The Supreme Court of Virginia unanimously affirmed the convictions and death sentence on direct appeal. Williams v. Commonwealth, 360 S.E.2d 361 (Va. 1987). This Court denied certiorari on January 11, 1988. Williams v. Virginia, 484 U.S. 1020 (1988).

Williams' habeas corpus petition was filed in the Danville Circuit Court on August 26, 1988. More than six years later, an amended petition was filed on April 24, 1995, and the circuit court held an evidentiary hearing on Williams' claims of ineffective assistance of counsel on June 15 and 16, 1995.

On July 1, 1995, jurisdiction over the case was transferred to the Virginia Supreme Court pursuant to amendments to Virginia Code § 8.01-654. The Virginia Supreme Court directed the lower court to report findings for the claims involved in the hearing, and the circuit court filed its findings on August 15, 1996. On January 13, 1997, the Virginia Supreme Court ordered briefing and argument on the one ineffective assistance of counsel claim that the circuit court had recommended for relief, and accepted the circuit court's findings recommending dismissal of all other claims.

On June 6, 1997, the Virginia Supreme Court unanimously rejected the circuit court's recommendation for relief, and denied the writ. Williams v. Warden, 487 S.E.2d 194 (Va. 1997). Following the denial of Williams' petition for rehearing on August 1, 1997, the Danville Circuit Court set an execution date of October 7, 1997.

On September 29, 1997, Judge James C. Cacheris of the United States District Court for the Eastern District of Virginia in Alexandria stayed Williams' execution and appointed counsel to represent Williams for his federal habeas corpus petition. Williams' petition was filed on December 12, 1997. On April 7, 1998, the district court ordered that the writ be granted with

respect to Williams' allegation that trial counsel were ineffective in failing to present certain mitigating evidence, and directed that Williams be re-sentenced. The remaining allegations in Williams' petition were dismissed.

On December 18, 1998, the United States Court of Appeals for the Fourth Circuit reversed the district court's order granting the writ, finding that Williams' ineffective counsel claim did not merit relief and that the Virginia Supreme Court's rejection of Williams' claim was not contrary to, nor an unreasonable application of, clearly established precedent of this Court. Williams v. Taylor, 163 F.3d 860, 869-870 (4th Cir. 1998). The Fourth Circuit affirmed the district court's dismissal of Williams' remaining claims. Williams' petition for rehearing was denied on January 15, 1999, without a single judge of the Fourth Circuit asking for a vote on the petition. The Court's mandate issued on January 25, 1999.

On February 10, 1999, as required by Virginia Code §53.1-232.1(iii), the Danville Circuit Court set Williams' execution for April 6, 1999. On February 22, 1999, Williams asked the Fourth Circuit to recall its mandate and issue a stay of execution. The Court of Appeals denied Williams' motion on March 3, 1999.

STATEMENT OF FACTS

The Crimes

The Virginia Supreme Court set out the facts of Williams' crimes in its opinion upholding his convictions and death sentence on direct appeal:

> Stone, an elderly man who resided on Henry Street in Danville, was found dead in his bed shortly before 2:00 a.m. Sunday, November 3, 1985. There was no sign of a struggle, no blood was observed on Stone's body, and he was fully clothed. Despite a diligent search, Stone's wallet, which he customarily kept fastened in the back pocket of his pants, was never found.

> The local medical examiner, who examined the body about 9:30 that Sunday morning, noted an abrasion on the chest, but no bruising. Stone's history of heart disease and the police failure to report anything suspicious about the circumstances of Stone's death led the local medical examiner to conclude that Stone's death was due to heart failure. However, when Stone's blood alcohol content was later analyzed and was reported to be 0.41%, the regional medical examiner's office in Roanoke amended the finding of the cause of death to alcohol poisoning. Stone's daughter testified Stone looked "a little high" when she last saw him entering his house shortly after 6:00 p.m. on Saturday, November 2, 1985.
>
> When the funeral director, Jack Miller, observed Stone's body on Monday morning, he called a bruise or abrasion over the left ribs to the attention of the police. The police told Miller that the local medical examiner believed the bruise was an old one. Though Miller disagreed with the local medical examiner, on instructions from the police he embalmed the body.
>
> Almost six months later, the chief of police in Danville received an anonymous letter from an inmate of the local jail in which the author admitted killing "that man Who Die on Henry St." The police interviewed Williams, an inmate of the Danville jail at the time, who eventually admitted that he had written the letter and later gave multiple confessions to the murder and robbery of Stone. Williams said he had first struck Stone in the chest, and later on his back, with a mattock and had removed three dollars from Stone's wallet.
>
> Stone's body was exhumed. On July 2, 1986 Dr. David Oxley, a forensic pathologist and Deputy Chief Medical Examiner for Western Virginia, performed an autopsy. When Dr. Oxley opened the body, he found Stone's fourth and fifth ribs on the left side had been fractured and displaced inward, puncturing the left lung and depositing a quantity of blood in the left chest cavity.

Williams v. Commonwealth, 360 S.E.2d at 363-364. See 28 U.S.C. § 2254(e)(1) (state court findings of fact presumed correct, and petitioner may overcome only with "clear and convincing evidence"); Sumner v. Mata, 449 U.S. 539, 547-549 (1981).

The Ineffective Counsel Claim

After the state habeas hearing, the state habeas judge recommended the granting of relief upon Williams' allegation that trial counsel were ineffective in failing to present additional mitigating evidence at sentencing.[1] The circuit court found that defense counsel failed to investigate and present Williams' juvenile commitment records from Beaumont Correctional Center and statements from Williams' siblings that described conditions in the Williams' household when he was a child; the possible testimony of Williams' wife, 11-year-old daughter, and friend, Bruce Elliott; evidence of Williams' borderline mental retardation; and evidence of Williams' good conduct while incarcerated. (JA 1036, 1059-1060).[2]

The Beaumont records consisted of 47 pages of documents concerning Williams' incarceration as a juvenile. (JA 705-748). Williams was committed to a juvenile institution for the first time when he was 11-years-old, for aiding and abetting larceny. He was committed again when he was 12 for making a false fire alarm. (JA 723). In 1971, when he was 15, he was committed for three counts of breaking and entering, and he remained incarcerated until he reached the mandatory release age of 21. (JA 724-726, 731).

The records also included a November 1967 juvenile court report concerning Williams' home life. (JA 718-723). The report described a 1957 intervention by authorities after the

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[1] Throughout his petition, Williams relies on the state habeas judge's mere recommendation. The Virginia Supreme Court, however, correctly concluded that the judge's recommendation erroneously was based upon a per se rule of prejudice, see Williams v. Warden, 487 S.E.2d at 200, which clearly is erroneous under this Court's precedents. See Burger v. Kemp, 403 U.S. 776 (1987); Strickland v. Washington, 466 U.S. at 691-692.

[2] References are to the Joint Appendix prepared for the appeal in the Fourth Circuit. A copy of the Joint Appendix has been lodged with the Court.

Williams children were discovered in their home unclothed, unfed, and unsupervised. Williams then was one-year-old. The Williams children were removed from their parents' custody from 1957 to 1959. (JA 718-719).

The 1967 report described the positive changes in Williams' family, noting that Williams' father had given up excessive drinking and bootlegging. (JA 721). Williams' father was described as: "regularly employed," "cooperative with the Court," "shows a genuine interest in his children," and "shows great concern over his family when they get involved in trouble." Mrs. Williams was noted as having "a great love and interest in her children but due to her limitations she seems to be ineffectual in disciplining them." (JA 721). The report described Terry Williams as one who:

> Never actually responds to any conversation or seems to understand right from wrong to any great degree. His parents always try to be cooperative and they say that they try to keep close touch on Terry but he just seems to slip away and go about the neighborhood doing as he pleases.

(JA 720). The 1967 report also described Terry Williams' then current criminal activities: an incident involving property damage at age 8, bicycle theft in 1966, and disorderly conduct, malicious damage, and larceny charges in 1967. (JA 719-720).

Four of Williams' siblings submitted affidavits in 1988 which stated that Terry Williams' parents drank excessively and fought, that Williams' father disciplined him with beatings and that Williams was "never a violent person." (JA 895-904). Williams' daughter, Jennie, described Williams as "a good daddy" in her affidavit and stated that she would have testified to that effect at Williams' trial in 1986. (JA 890). At the time of trial, Jennie Williams was just 11 years old and her father had been in prison for all but three years of her life. Williams' ex-wife submitted an

affidavit that described the three years (1973-1976) she had been married to Williams. (JA 892-894).

Finally, the circuit court noted an affidavit from Bruce Elliott, a C.P.A. in Harrisonburg, Virginia, who met Terry Williams in 1978 while Williams was incarcerated for his 1976 robbery conviction. Elliott's affidavit indicated that he was involved in a local church's prison ministry program and saw Williams frequently. (JA 882-883). Elliott stayed in contact with Williams after he was transferred to a different correctional unit, and while Williams was on parole. Elliott's affidavit stated that he would have testified that Williams was proud of his accomplishments in prison, and that he was mild mannered, not aggressive. (JA 883, 885). [3]

At Williams' 1986 sentencing, the prosecution presented evidence of Williams adult convictions for robbery and of other recent violent criminal conduct. ***Within several months of the Stone murder, Williams had stabbed an elderly man after starting a diversionary fire in his home and brutally beat an elderly woman, leaving her in a "vegetative state."*** The Commonwealth did not present any evidence concerning Williams' extensive juvenile record.

Williams' sentencing case in 1986 presented two character witnesses, Williams' mother, and a psychiatrist. Williams' mother did not mention any of the alleged incidents of his childhood subsequently raised in his habeas action, but testified generally that Williams was a "nice boy at

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[3] In regard to Williams' other ineffective counsel claims, the circuit court found that counsel competently handled the testimony of two mental health experts, Drs. Centor and Ryans, and their opinions that Williams was dangerous. The state court also found "no prejudice" in regard to the psychiatric testimony of future dangerousness because the evidence of Williams' prior criminal activity alone overwhelmingly supported the future dangerousness finding. (JA 1041, 1048). The state court also found that counsel followed a reasonable strategy in argument at sentencing, by stressing Williams' remorse and cooperation with the police. (JA 1094).

home." (JA 199). Both character witnesses attempted to portray Williams as non-violent, but were subjected to extremely damaging cross-examination by the prosecutor based on Williams' violent criminal history. (JA 191-192, 197-198). The psychiatrist could offer only that Williams claimed to have unloaded his pistol prior to committing a robbery in 1976. (JA 184-185).

Without reaching the issue of counsel's allegedly deficient performance, the Virginia Supreme Court rejected the state habeas judge's recommendation that Williams be granted relief because Williams clearly failed to demonstrate Strickland prejudice:

> The jury was presented with the murder of an intoxicated, elderly person in his own bedroom committed by a 31-year-old man. The murder weapon was a tool customarily used to dig stumps. At the time, defendant had been out of the penitentiary for only seven months, released on parole for convictions of burglary and grand larceny.
>
> The accused was in the midst of a crime spree, preying upon defenseless individuals. Following commission of these crimes of murder and robbery in November 1985, the defendant savagely beat an elderly woman about her head in March 1986, leaving her lying in the street unconscious with multiple injuries. At the time of trial, she was in a nursing home "vegetating" from a brain injury with no hope of recovery.
>
> Upon being questioned in April and May 1986 about the November 1985 crimes, the defendant admitted to the recent theft of two motor vehicles. He also admitted setting fire to clothes on the porch of a residence late one night in December 1985, luring the occupant outside, and stabbing him with a knife in order to rob him. The accused later was convicted of the vehicle thefts and, at the time of trial for the present crimes, had been convicted of an arson that took place in the city jail.
>
> While held in jail on the present offenses, he related to a police officer "that he wanted to just choke some of the guys in the jail cell, and one day some had gone to the library and one guy was laying on the bed, and he got the urge to just go over and choke him. Another time he was playing cards and he thought he could

just hit someone and break that person's jaw without him ever knowing what hit him."

The jury also heard that defendant had served time in the penitentiary for an armed robbery committed when he was about 20 years old. The jury did not know of 14 criminal offenses committed by defendant from 1966 to 1975.

Drawing on Strickland [v. Washington, 466 U.S. 668 (1984)], we hold that, even assuming the challenged conduct of counsel was unreasonable, the prisoner "suffered insufficient prejudice to warrant setting aside his death sentence," 466 U.S. at 698-99, the predicate of which was that there is a probability that he would commit criminal acts of violence which would constitute a continuing serious threat to society. The mitigation evidence that the prisoner says, in retrospect, his trial counsel should have discovered and offered ***barely would have altered the profile of this defendant that was presented to the jury. At most, this evidence would have shown that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment. Of course, those assumptions are belied by the four-month crime spree beginning with the present crimes and by the defendant's current attitude while in jail toward other inmates***.

What the Supreme Court said in Strickland applies with full force here: "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." 466 U.S. at 700. Indeed, disclosure of the defendant's juvenile history might even have been harmful to his case.

Williams v. Warden, 487 S.E.2d at 199 (emphasis added).

REASONS WHY THE WRIT AND A STAY SHOULD BE DENIED

I. THE FOURTH CIRCUIT'S ROUTINE, FACT-BOUND APPLICATION OF STRICKLAND V. WASHINGTON PROVIDES NO COMPELLING REASON FOR CERTIORARI REVIEW OR A STAY OF EXECUTION.

The Fourth Circuit applied Strickland v. Washington, 466 U.S. 668 (1984), and Lockhart v. Fretwell, 506 U.S. 364 (1993) to the particular facts of Williams' case and agreed with the Virginia Supreme Court that he could not demonstrate that he was prejudiced by trial counsel's alleged errors at the 1986 sentencing proceeding. Williams has dissected the Virginia Supreme Court's and Fourth Circuit's opinions and raises three challenges. He asserts that references to Lockhart in the state court opinion suggest that the Virginia Supreme Court applied an erroneous "windfall" prejudice analysis which the Fourth Circuit erroneously found to be reasonable; that the Fourth Circuit instead should have applied a "one juror" standard of prejudice that is more relaxed than the Strickland standard; and, that the application of Strickland by the state court and Fourth Circuit improperly involved a "weighing state" analysis in a "non-weighing" state.

Williams' contentions are simply wrong and provide no compelling reasons for certiorari review. See U.S.S.Ct. Rule 10. The Fourth Circuit conducted a thorough review of the factual basis of Williams' ineffective counsel claim, concluded under § 2254(d) that the Virginia Supreme Court reasonably applied this Court's precedents in rejecting Williams' claim, and independently found that Williams could not demonstrate prejudice. These fact-specific applications of Strickland v. Washington and Lockhart v. Fretwell present no compelling reasons for certiorari review.

A. The Fourth Circuit correctly upheld the Virginia Supreme Court's determination that a showing of Strickland "prejudice" requires a showing that the sentencing proceeding was unfair.

Williams contends that the Fourth Circuit improperly concurred in the Virginia Supreme Court's reliance upon Lockhart v. Fretwell in concluding that Williams had not demonstrated Strickland prejudice. In Lockhart, this Court held that a defendant seeking to show Strickland prejudice must demonstrate that the proceeding was rendered unreliable or fundamentally unfair. The prisoner in that case had shown that his trial counsel had failed to make a motion which would have succeeded under the law as it existed at the time of trial but which subsequently was overruled. The Court held that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Lockhart, 506 U.S. at 369.

Williams asserts that the Court of Appeals should have ruled the state court's application of Strickland ***and*** Lockhart was unreasonable because Lockhart is distinguishable on its facts from his case. According to Williams, Lockhart is applicable only when the defendant is asserting a prior right that the law no longer recognizes. These arguments, however, are irrelevant.

The Virginia Supreme Court's reference to Lockhart does not even remotely suggest that the state court somehow agreed with Williams' contention that a different outcome at sentencing was reasonably probable, or that the state court considered such a result a "windfall." Instead, the Virginia Supreme Court clearly stated its conclusion that Williams had failed to meet the Strickland standard:

> "[T]he prisoner's assertions about the potential effects of the omitted proof do not establish a "reasonable probability" that the

> result of the proceeding would have been different, nor any probability sufficient to undermine the outcome."

Williams v. Warden, 487 S.E.2d at 199-200. The Fourth Circuit also correctly stated and applied the Strickland standard:

> If Williams is able to demonstrate that his trial counsel's performances were objectively unreasonable, he must then "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Williams v. Taylor, 163 F.3d at 866. Thus, Williams' assertion that the Fourth Circuit (and the Virginia Supreme Court) were able to deny relief only by "altering" the Strickland standard simply is belied by those courts' written opinions.

As Chief Justice Rehnquist's majority opinion makes clear, Lockhart merely applied the rule of Strickland, which required that counsel's errors be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Lockhart, 506 U.S. at 369, quoting Strickland, 466 U.S. at 687. Strickland itself concludes with the statement that the prisoner "made no showing that the justice of his sentence was rendered unreliable," and that his "sentencing proceeding was not fundamentally unfair." Strickland, 466 U.S. at 700. Thus, the Fourth Circuit rightly concluded that Lockhart's holding that a prisoner must demonstrate that counsel's errors rendered his trial's result unreliable or the proceedings fundamentally unfair, is merely a reiteration of Strickland prejudice, not an alteration of the Strickland standard. Williams v. Taylor, 163 F.3d at 869.

The Fourth Circuit thus correctly concluded that the state court reasonably applied "clearly established federal law, as determined by the Supreme Court of the United States." 28

U.S.C. § 2254(d)(1). The state court clearly applied Strickland in finding that Williams had not established "a 'reasonable probability' that the result of the [sentencing] proceeding would have been different," and Lockhart in finding that the sentencing proceeding "was not fundamentally unfair or unreasonable."[4] See Williams v. Warden, 487 S.E.2d at 199.

The fact-specific application of Strickland and Lockhart by the Fourth Circuit clearly presents no issue warranting the grant of certiorari or a stay of execution.

B. The Fourth Circuit correctly rejected Williams' erroneous "one juror" prejudice analysis.

Virginia law provides that the trial court will impose a life sentence in a capital case if the jury is unable to agree unanimously on a sentence. Va. Code § 19.2-264(E). Williams assumes that one juror is "easier to persuade" than twelve, and from that premise argues that his burden under Strickland to show a reasonable probability of a different sentencing outcome should be satisfied if he merely shows that one juror probably would have voted for a life sentence if trial counsel had presented all of Williams' mitigation evidence. This argument, however, cannot warrant the granting of certiorari.

The Fourth Circuit correctly upheld the Virginia Supreme Court's finding of no Strickland prejudice, and rejected Williams' claim to a less rigorous standard:

> A court may not assume that one juror may be more likely swayed by mitigating evidence than his fellow jurors. See Strickland, 466 U.S. at 695 (noting that a finding of prejudice does not "depend upon the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency"). Rather, the

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[4] As the Fourth Circuit noted, the Virginia Supreme Court's reliance on Lockhart in addition to Strickland is consistent with the application of Lockhart by the various courts of appeals. Williams v. Taylor, 163 F.3d at 869.

> Strickland prejudice standard assumes twelve reasonable, conscientious, and impartial jurors. Thus, that one hypothetical juror may be swayed by a particular piece of evidence is insufficient to establish prejudice.

Williams v. Taylor, 163 F.3d at 568. The only "juror" that may be considered in the Strickland prejudice context, therefore, is the generic reasonable, conscientious, and impartial juror who reasonably applies the law to the facts of the case, ***not*** "one juror" the prisoner arbitrarily assumes has a propensity to view his case more favorably than his colleagues. See Strickland, 466 U.S. at 695 ("An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, 'nullification,' and the like.").

The rule Williams advocates would constitute a significant expansion and softening of the stringent Strickland prejudice standard.[5] Clearly, Strickland itself cannot support such a rule.[6] See 466 U.S. at 695 (prejudice inquiry should not depend upon a decisionmaker's "unusual propensities toward harshness or leniency"). Williams is not entitled to the creation of such a new rule in this collateral proceeding. See Teague v. Lane, 489 U.S. 288 (1989); Stewart

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[5] The rule Williams advocates cannot be limited only to Virginia, or to only where a life sentence is imposed if a jury cannot agree on a sentence. On the contrary, Williams' purported rule would require the assessment of the likelihood that his hypothetical "one juror" can "hold-out" and preclude or alter a finding of guilt or sentence in any criminal trial where jury unanimity is required.

[6] Williams asserts that the Fourth Circuit's decision on this point is contrary to authority in other circuits. It is not at all clear that any of the cases upon which petitioner relies considered the "one juror" approach to be any less stringent than the Strickland standard, or even that such an approach resulted in a different outcome than what a Strickland analysis would have reached. Even if hypothetically there were other circuits which were failing to apply Strickland correctly, such decisions could not constitute a "conflict" warranting a grant of certiorari ***in Williams' case***. There simply is no question that the Fourth Circuit correctly understood and applied the Strickland prejudice standard in Williams' case.

v. LaGrand, 1999 U.S. LEXIS 1715, No. A-735 (March 3, 1999) (a holding that Eighth Amendment claims cannot be waived in capital cases would constitute impermissible "new rule").

C. *Neither the Fourth Circuit nor the Virginia Supreme Court engaged in an improper "weighing" analysis.*

Williams' assertion that the Strickland standard applies only in "weighing" States presents no compelling reason for certiorari review. Summarizing its rejection of Williams' ineffective assistance of counsel claims, the Virginia Supreme Court concluded:

> What the Supreme Court said in Strickland applies with full force here: "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstance and hence the sentence imposed."

Williams v. Warden, 487 S.E.2d at 200. Because Strickland v. Washington involved a Florida prisoner and, because Florida is a "weighing" State, Williams argues that Strickland's reference to aggravating evidence "outweighing" mitigating evidence should not apply in cases from Virginia which is a "non-weighing" State.[7]

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[7] For purposes of reviewing death sentences supported in part by an invalid aggravating factor, this Court has recognized a distinction between state death sentencing schemes which require a jury to weigh aggravating circumstances against mitigating circumstances and those that do not. See Zant v. Stephens, 462 U.S. 862 (1983). The term "weighing state," since Zant, has become a term of art in capital case jurisprudence, providing a short-form method of distinguishing state capital sentencing regimes. See Clemons v. Mississippi, 494 U.S. 738, 752 (1990); Espinosa v. Florida, 505 U.S. 1079, 1082 (1992); Stringer v. Black, 503 U.S. 222, 229 (1992); Tuilaepa v. California, 512 U.S. 967, 986 (1994); Parker v. Dugger, 498 U.S. 308, 318 (1991); Lambrix v. Singletary, 520 U.S. 518 (1997). Florida is a "weighing state," see Parker v. Dugger, 498 U.S. at 318, and Virginia is not. See Tuggle v. Netherland, 79 F.3d 1386, 1389 (4th Cir.), cert. denied, 519 U.S. 894 (1996).

Williams' argument is frivolous.[8] Strickland contains no reference to Florida being a "weighing state" or any suggestion that the opinion was written to apply only to Florida, or other "weighing states." It is not uncommon for a reviewing court to use the concept of weight or balance in assessing prejudice in a Strickland context without regard to the separate and independent term of art describing a State's death penalty regime. In Strickland, the Court alternatively stated that the question is whether there is a reasonable probability that "the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. The Fourth Circuit noted that it too has used the identical quotation from Strickland in rejecting a South Carolina prisoner's claim of prejudice in a capital sentencing, and South Carolina, like Virginia, is not a "weighing" State. Williams v. Taylor, 163 F.3d at 870.

Neither the Virginia Supreme Court's accurate reiteration of the Strickland standard, nor the Fourth Circuit's concurrence in the state court's rejection of Williams' ineffective counsel claim, warrants this Court's review.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE FOURTH CIRCUIT'S STRAIGHTFORWARD APPLICATION OF SECTION 2254(d), WHERE THE FOURTH CIRCUIT INDEPENDENTLY FOUND THAT WILLIAMS' CLAIM WAS WITHOUT MERIT.

The Fourth Circuit's application of § 2254(d) does not warrant certiorari review. Williams argues that the circuit courts are "deeply divided" in interpreting 28 U.S.C. § 2254(d), and that the Fourth Circuit's view of the statute is unconstitutional. There is, however, no valid

[8] Williams never asserted this argument in state court or in the district court, but concocted it for the first time in his appeal to the Fourth Circuit.

claim of a relevant conflict among the circuits, and the Fourth Circuit's construction of the statute in Williams' case presents no valid basis for review by this Court.

First, Williams' argument about the Fourth Circuit's interpretation of § 2254(d) is a moot point because his allegations of ineffective trial counsel were considered de novo by the Fourth Circuit under the Strickland v. Washington standard and found insufficient to warrant relief. The Fourth Circuit expressly agreed with the Virginia Supreme Court's conclusion that Williams could not demonstrate Strickland prejudice. Williams v. Taylor, 163 F.3d at 868 ("Like the Virginia Supreme Court, we readily conclude that Williams was not prejudiced in any way by trial counsel's actions"). Thus, the Fourth Circuit's alternative ruling that the state court's rejection of Williams' claim was "reasonable" within the meaning of § 2254(d) cannot serve as a basis for granting certiorari.

In Green v. French, 143 F.3d 865 (4th Cir. 1998), cert. denied, 119 S.Ct. 844 (1999),[9] the Fourth Circuit stated the standard for review under § 2254(d):

> If a state court decision is in square conflict with a precedent (supreme court) which is controlling as to law and fact, then the writ of habeas corpus should issue; if no such controlling decision exists, the writ should issue only if the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant supreme court precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts. In other words, habeas relief is authorized only when the state courts have decided

[9] The petitioner in Green v. French presented essentially the same argument in his petition for certiorari to this Court and the Court denied review. Green v. French, No. 98-7096, Petition for Writ of Certiorari at 15-22.

> the question by interpreting or applying the relevant precedent in a manner than reasonable jurists would all agree is unreasonable.

143 F.3d at 870. Williams has failed to demonstrate any "compelling" reason why the Fourth Circuit's articulation of the standard merits review by this Court.

A. "Contrary to"

Williams asserts there is an alleged disagreement between the Fourth and First Circuit regarding the meaning of § 2254(d)'s reference to state decisions that are "contrary to" this Court's precedents. However, the meaning of "contrary to" in § 2254(d) never has been an issue in this case and is no part of the decision below. Williams never has asserted before now that the "contrary to" clause had any application to his claims, much less that it should be interpreted in a specific fashion. He did not suggest in the court below, and he still has not argued here, that the Virginia Supreme Court's decision in his case was "contrary to" established precedent of this Court. This Court obviously should not grant certiorari to resolve an alleged "conflict" between circuits that is entirely irrelevant to the case.

The alleged conflict Williams sees between the Fourth and First Circuits, moreover, is non-existent. The Fourth Circuit has concluded that a state court decision is

> "contrary to" precedent only when, either through a decision of pure law or the application of law to facts indistinguishable in any material way from those on the basis of which the precedent was decided, that decision reaches a legal conclusion or a result opposite to and irreconcilable with that reached in the precedent that addresses the identical issue.

Green, 143 F.3d at 870. The First Circuit, in O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998), concluded that the "contrary to" review asks

> whether a Supreme Court rule – by virtue of its factual similarity (though not necessarily identically) or its distillation of general

> federal law precepts into a channeled mode of analysis specifically intended for application to variant factual situations – can fairly be said to require a particular result in a particular case.

O'Brien, 145 F.3d at 25. Far from suggesting a "significant divergence of analysis," these decisions represent entirely consistent approaches to § 2254(d)'s "contrary to" clause.

B. No split

Williams' assertion of a split among the circuits is simply incorrect. Those circuits that have addressed the issue of the appropriate standard of review all agree that strong deference is required to the state court decision on the prisoner's claim.

Like the Fourth Circuit, the Fifth and Eleventh Circuits also have held that habeas relief may be granted only if the state court decision is so clearly incorrect that it would not be debatable among reasonable jurists. Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996), cert. denied, 520 U.S. 1107 (1997); Neelley v. Nagle, 138 F.3d 917, 924 (11th Cir. 1998) (adopting Drinkard standard), cert. denied, 119 S.Ct. 871 (1999). The First Circuit has held that "for the writ to issue, the state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." O'Brien v. Dubois, 145 F.3d at 25 n.7. The Seventh Circuit has stated that the reasonableness of the state court's application of precedent turns on "whether the determination is at least minimally consistent with the facts and circumstances of the case." Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir.), cert. denied, 118 S.Ct. 72 (1997). The Sixth Circuit has adopted the Drinkard statement of "debatable among reasonable jurists," see Herbert v. Billy, 160 F.3d 1131 (6th Cir. 1998), ***and*** O'Brien's description of a "universe of plausible, credible outcomes." See Nevers v. Killinger, ___ F.3d ___, 1999 U.S. App. LEXIS 3126 (6th Cir. 3/1/99).

Thus, every circuit court decision that Williams relies upon agrees that § 2254(d) has abrogated de novo review. Specifically, a federal court no longer may grant habeas relief "merely because that court disagrees with the state court's decision, or because, left to its own devices, it would have reached a different result." O'Brien, 145 F.3d at 25. See also Drinkard, 97 F.3d at 768 ("'unreasonable application standard of review of a state court decision just mean more than that a federal court may grant habeas relief based on its simply disagreement with the state court decision"); Hennon, 109 F.3d at 334 ("The fact that we might disagree with the state court's determination...would not carry the day...."); Neelley, 138 F.3d at 924 ("The mere fact that a district court disagrees with a state court does not render that state court's decision 'unreasonable.'").

The concept of respect for reasonable decisions by state courts is hardly novel. The Teague "new rule" doctrine similarly "validates reasonable, good-faith interpretations of existing precedents made by state courts." Butler v. McKellar, 494 U.S. 407, 414 (1990).

> Reasonableness, in this as in many other context, is an objective standard. Stringer v. Black, 503 U.S. 222, 237 (1992). Accordingly, we will not disturb a final state conviction or sentence unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court.

O'Dell v. Netherland, 119 S.Ct. 1969, 1973 (1997). Objective reasonableness is determined by asking whether the rule the prisoner seeks was "susceptible to debate among reasonable minds." Id.; see Butler, 494 U.S. at 415; Sawyer v. Smith, 497 U.S. 227, 236-237 (1990).

Not surprisingly, the various courts of appeals have interpreted § 2254(d)'s "unreasonable application" language in conformity with the "objective reasonableness" standard of the "new

rule" analysis. See O'Brien, 145 F.3d at 25 (tying "universe of plausible, credible outcomes" to Teague rule to uphold "reasonable good faith interpretations of existing precedents"); Drinkard, 97 F.3d at 769 (habeas relief available only if sate decision so incorrect that it would not be debatable among reasonable jurists); Neelley, 138 F.3d at 923-924 and n.4 (clearly established and unreasonable application provisions are "akin to the Teague doctrine"); Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996), rev'd on other grounds, 117 S.Ct. 2059 (1997) (purpose of "unreasonable application of" clause to "validate[ ] reasonable, good-faith interpretations of existing precedents made by state courts").

Williams' hyperbolic characterization of the Fourth Circuit's construction of § 2254(d) – he concludes that it requires the denial of relief in every case – simply does not present an issue warranting certiorari review. The Court of Appeals' conclusion that the Virginia Supreme Court's decision was not an "unreasonable application" of this Court's precedents clearly is correct under any existing interpretation of § 2254(d) existing in the circuits. Indeed, Williams does not even assert, nor could he, that he would be entitled to relief under any of the interpretations of § 2254(d) which any other circuit has adopted.

Finally, Williams' contention that the Fourth Circuit's construction of § 2254(d) offends the Constitution is unfounded. In Green, the Fourth Circuit noted:

> [A]mended section 2254(d) does not limit any inferior federal court's independent interpretive authority to determine the meaning of federal law in any Article III case or controversy. Under the AEDPA, we are free, if we choose, to decide whether a habeas petitioner's conviction and sentence violate any constitutional rights. Section 2254(d) only places an additional restriction upon the scope of the habeas remedy in certain circumstances.

Green, 143 F.3d at 874-875. See also Lindh, 96 F.3d at 872. This Court has made it clear that "judgments about the proper scope of the writ [of habeas corpus] are "normally for Congress to make." Felker v. Turpin, 518 U.S. 651, 664 (1996) (quoting Lonchar v. Thomas, 517 U.S. 314, 323 (1996). The Fourth Circuit's interpretation of § 2254(d) is entirely consistent with Felker and presents no issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari and the application for a stay of execution should be denied.

Respectfully submitted,

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